

**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 21613/23

In the matter between:

**THE MINISTER OF FORESTRY,
FISHERIES AND THE ENVIRONMENT**

First Applicant

**THE DEPUTY DIRECTOR GENERAL OF THE
FISHERIES BRANCH OF THE DEPARTMENT OF
FORESTRY, FISHERIES AND ENVIRONMENT**

Second Applicant

And

ULWANDLE FISHING (PTY) LTD

First Respondent

ULWANDLE INSHORE (PTY) LTD

Second Respondent

FISHERMEN FRESH CC

Third Respondent

PREMIER FISHING SA (PTY) LTD

Fourth Respondent

LETAP CC

Fifth Respondent

MAYIBUYE FISHING (PTY) LTD

Sixth Respondent

OFFSHORE FISHING COMPANY (PTY) LTD

Seventh Respondent

CAPENIS INVESTMENTS (PTY) LTD

Eighth Respondent

JC FISHING CC	Ninth Respondent
ALGOA MARINE EXPORTERS (PTY) LTD	Tenth Respondent
ZIMKITHA FISHING (PTY) LTD	Eleventh Respondent
VECTO TRADE 126 (PTY) LTD	Twelfth Respondent
TIMOWISE (PTY) LTD	Thirteenth Respondent
ZWM FISHING (PTY) LTD	Fourteenth Respondent
BAYANA BAYANA FISHING CC	Fifteenth Respondent
UKLOBA FISHING (PTY) LTD	Sixteenth Respondent
DYER EILAND VISSRYE (EDMS) BEPERK	Seventeenth Respondent

Heard: 14 December 2023

Delivered (electronically): 01 March 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an urgent application in which the applicants seek an order authorising the second applicant, including the officials of the Department of Forestry, Fisheries, and the Environment under the control of the second applicant, to refuse to issue fishing permits to current Category B right holders in the horse mackerel fishing

sector for the 2024 fishing season pending the handing down of judgments in the review applications instituted in this court by the thirteenth to the seventeenth respondents under case numbers 8760/22; 17233/20; 17234/24 and 6084/2023.

[2] In addition, the applicants seek an order interdicting any Category B right holder who has already been issued with a grant of right letter from being issued with a fishing permit for the horse mackerel 2024 fishing season in terms of such permit, pending the finalisation of the pending review applications. The applicants further seek an order that the pending review applications set out above, be subjected to a case management process by the Acting Judge President to ensure that they are finalised by 29 February 2024.

[3] The second respondent opposed the applicant's application and implored the court to strike the application off the roll for lack of urgency.

The Background Facts

[4] The first applicant, the Minister of Forestry, Fisheries, and the Environment ("the Minister"), is responsible for the administration of the Marine Living Resources Act 18 of 1998 ("the MLRA") and for overseeing the functions and strategic objectives of the Fisheries Management Branch within the Department. In the conduct of her duties, the Minister is guided by the principles set out in section 2 of the MLRA, which include transforming the fishing industry, something that is particularly relevant to the Category B applicants for fishing rights. The purpose is to

encourage new and particularly previously disadvantaged entities and persons to become involved in the fishing industry.

[5] The Minister is also the Appeal Authority stipulated in the MLRA, to whom appeals in terms of section 80(1) of the MLRA lay. The second applicant is the Deputy Director General: Fisheries Management Branch, Department of Forestry, Fisheries, and the Environment ("the DDG"). Acting in terms of section 79 of the MLRA, the Minister delegated the power to grant rights in each fishery to the DDG.

[6] Commercial fishing is a regulated economic activity in terms of the MLRA which requires the granting of a commercial fishing right by the Minister in terms of section 18(1) and the annual issue of permits in terms of section 13(1) of the MLRA. The issues that arise in this application concern the allocation of commercial fishing rights in the 205/2016 Fishing Rights Allocation Process (FRAP:2015/2016) in the horse mackerel fishery sector. As part of the initial allocation process, the Department streamed fishing entities into three evaluation categories for fishing rights in the horse mackerel fishery in FRAP 2015/2016 to ensure fairness and rationality during the application process.

[7] The three evaluation categories are the following: the first category was those applicants who held rights to the horse mackerel fishery until 31 December 2015; they were right-holder applicants and categorised as Category A applicants. The second category relates to applicants who held rights in sectors other than the horse mackerel fishery from 2006 to 2015 and are considered new entrant applicants; they were categorised as Category B applicants. The third category comprised applicants who had not held fishing rights in any of the commercial fishery sectors in South

Africa during the long-term Rights Allocation Management Process and were categorised as category C applicants.

[8] In the instant matter, each of the first to the seventeenth respondents holds fishing rights in at least one fishing sector and is categorised as a Category B applicant. The first to the twelfth respondents are Category B rights holders in the horse mackerel fishery who have been awarded commercial horse mackerel fishing rights. The thirteenth to the seventeenth respondents are category B applicants and are the applicants in different court challenges against the Minister, all of which relate to the horse mackerel fishery. The DDG initially allocated the thirteenth to the seventeenth respondents commercial horse mackerel fishing rights; however, they failed to qualify for a commercial horse mackerel fishing right on appeal in terms of the Minister's appeal decision of 31 March 2022.

[9] According to the Minister, the interdictory relief sought in the Notice of Motion seeks to ensure that all affected category B fishing entities are treated the same; that is, no one will be permitted to fish horse mackerel pending the determination and finalisation of the litigation (review applications) instituted in respect of category B of the horse mackerel fishery. As stated above, the critical issues in this application concern the allocation of commercial fishing rights in the FRAP 2015/2016 Fishing Rights Allocation Process in the horse mackerel fishery.

[10] The current horse mackerel fishing season ended on 31 December 2023, and the new season commenced on 01 January 2024. The total allowable catch for each fishing season is determined prior to the commencement of each fishing season.

Once the total allowable catch is set in tons, right holders can immediately calculate how much fish they are entitled to catch as soon as the new season begins by applying their percentage allocation against the total tonnage of fish available to be caught in the upcoming season.

[11] At the commencement of each fishing season, each successful right holder is permitted to catch its allocated percentage of the total allowable catch, as determined annually. In other words, if the total allowable catch for a sector is 100 tons for the new season, and if 10 right holders were each allocated 10 per cent of the total allowable catch by the DDG in the original decision, that right holder will be entitled to catch 10 tons of fish the moment the new fishing season opens.

[12] The fishing allocation process for 2015/2016 commenced with an invitation by the Department of Forestry, Fisheries and Environment to interested parties to submit applications. The Department received a total of eighty (80) applications for the allocation of rights in the horse mackerel fishery. The process followed on the reversion of the rights granted to rights holders under section 18 of the MLRA. To ensure fairness and rationality during the application process, the eighty (80) applications were streamed into one of the 3 evaluation categories: A, B and C, as explained above.

[13] Following an extensive multi-stage process, on 10 November 2016, the DDG published the General Published Reasons for the Decisions on the Allocation of 2015/2016 Fishing Rights and Quantum in the Horse Mackerel Fishery. In terms thereof, the DDG provisionally decided to allocate a total of 33 commercial horse

mackerel fishing rights for a period of 15 years commencing on 01 January 2017 and terminating and reverting to the State on 31 December 2031. Of the 33 commercial horse mackerel fishing rights provisionally granted, 6 were allocated to Category A applicants, 27 were allocated to Category B applicants, and 4 were allocated to Category C applicants.

[14] Furthermore, the DDG provisionally allocated the rights to 23 Category B applicants because they were the top-scoring applicants in their stream in view of the score of above 50 per cent and, in so doing, had regard to the policy objectives as well as Section 2 and section 18 of the MLRA.

[15] Subsequently, the DDG invited applicants to comment on the provisional decisions, including the provisional allocations and proposed quantum allocation methodology. On 20 December 2016, following receipt and consideration of the comments, the DDG published the Addendum to the DDG General Published Reasons, which sets out the extent to which the provisional decisions published on 10 November 2016 were amended and further recorded and confirmed the DDG's final decision. The application of the DDG's quantum methodology resulted in the new entrants' pool comprising a cumulative total of 57,12 per cent of the total allowable catch for horse mackerel. The quantum was allocated to those Category B and Category C applicants who scored above 50 points.

[16] The Addendum to the DDG's general published reasons further recorded every applicant's entitlement to appeal against any aspect of the DDG's decision. Pursuant thereto, appeals were submitted by unsuccessful Category B entities

against the DDG's exclusion or scoring them. In response to the appeals, the DDG submitted a report concerning the appeals in terms of Regulation 5(3) of the Regulations promulgated under the MLRA. On 24 May 2019, the former Minister of Agriculture, Forestry and Fisheries (Zokwana) published his appeal decision. The appeal decision issued by Minister Zokwana led to two Category B appellants being granted commercial horse mackerel rights on appeal, namely, Bayana Bayana and Ukloba.

[17] Regarding Bayana Bayana, the Minister found on appeal that the application fee was paid in full before the stipulated closing date and time and that the perceived short payment resulting in its exclusion was a result of Bayana Bayana attaching the wrong proof of payment. The Minister awarded Bayana Bayana a score of 63,24, which was above the 50% threshold, and thus allocated a horse mackerel fishing right to it. In respect of Ukloba, the Minister held on appeal that the decision by the DDG to exclude Ukloba should be reversed. Ukloba was awarded a score of 65,91%, which was above the 50 per cent threshold, and therefore, Ukloba was allocated the right to horse mackerel fishing.

[18] Following the publication of the 2019 Appeal Decision, three entities, namely, Blue Continent Products (Pty) Ltd, Sea Harvest Corporation (Pty) Ltd and Ivryn Johnson Ltd, instituted an application to review and set aside Minister Zokwana's 2019 Appeal Decision in relation to the appeals in the horse mackerel fishery. On 3 December 2020, an order by agreement reviewing Minister Zokwana's appeal decision in its entirety was granted, and the Minister was directed to make her decision within seven months from the date of the order. As a result of this order, the

Minister was required to reconsider all the appeals concerning Category A, B, and C in the horse mackerel fishery afresh.

[19] Subsequent thereto, in terms of a notice dated 19 March 2021, the current Minister invited applicants in the horse mackerel fishery to furnish supplementary representations. Having received and considered various comments and representations, on 28 December 2021, the current Minister published her Provisional General Published Reasons for the Decisions on Appeal in the horse mackerel fishery 2015/2016 on the Department's website. The Provisional Published Reasons on Appeal set out the Minister's provisional decision on the allocation of rights and quantum, which was subject to confirmation or variation upon receipt of comments from the affected Category B right holders and addressed the grounds of appeal raised by the applicants. The Minister's appeal decision was pursuant to court orders granted in respect of the review applications in which she was required to reconsider afresh all the appeals in relation to Category A, B, and C appellants in the horse mackerel fishery.

[20] The Minister consulted with the technical advisory team on horse mackerel to determine the proposed quantum allocation methodology regarding the allocation of rights to a successful appearance on appeal. In addition, the Minister appointed an appeal advisory team consisting of a panel of practising advocates, which made preliminary appeal recommendations after evaluating and assessing the appeals. In her appeal finding, the Minister proposed, among others, to allow 12 top-scoring Category B entities and 7 Category C entities into the sector. The result was that 13 previously successful category B entities were outscored and unsuccessful. The

entities that scored the highest in Category B were the respondents from the first one to the twelfth one.

[21] On 10 January 2022, the Minister issued a notice to all applicants in the horse mackerel fishery and informed the applicants in that sector that she proposed to deviate from the quantum allocation methodology that the DDG previously implemented. This deviation would have the effect that 13 right holders who were previously allocated rights in the horse mackerel fishery would no longer qualify for commercial fishing rights in the horse mackerel fishing sector. As a result, affected right holders were invited to make written representations in terms of section 80(3) of the MLRA as to why the proposed quantum allocation methodology should not be adopted or to provide the reasons as to why they should not be excluded from successful applicants for a fishing right.

[22] Upon receipt and consideration of the comments and/or representations from the horse mackerel fishery, on 31 March 2022, the Minister published the Final General Published Reasons for the decisions on appeal in the horse mackerel fishery 2015/2016. According to the Minister's Final General Published Reasons; Decisions of Appeal, the Minister deviated from the quantum allocation methodology of the DDG, which provided for an allocation of commercial horse mackerel fishing rights to applicants who scored above 50 percent. Instead, the Minister determined that an appropriate quantum allocation methodology would be one that allows the 12 top-scoring Category B entities into the horse mackerel fishery and would allocate 20 percent of the total allowable catch to the 12 top-scoring category B entities.

[23] The Minister asserted that in arriving at her decision, she considered and balanced a wide range of factors which, amongst others, include the principles applicable to the allocations of fishing rights as derived from the Constitution and the MLRA, the need to broaden access to the fishery by introducing new entrants, the fact that in most instances, Category A and B entities have rights in other sectors and are thus not wholly reliant on the horse mackerel allocation alone and the desirability of giving successful applicants reasonable prospects of active and meaningful participation in the fishery. Having considered all the relevant information, including individual appeals, as well as the comments received in response to the Provisional Appeals reasons, on 31 March 2022, the Minister determined the entities in Category A, B, and C which would be awarded a right in the horse mackerel sector.

[24] Dissatisfied with the Minister's Appeal decision not to award them a long-term commercial horse mackerel fishing right, the thirteenth to the seventeenth respondents instituted review applications challenging the Minister's appeal decision of 31 March 2022. The thirteenth respondent instituted review proceedings in this court under case number 8760/22 in which it sought an order to review and set aside the Minister's decision to terminate or revoke the 15-year-long commercial horse mackerel fishing right granted to it on 20 December 2016 by the DDG. The application was heard on 14 March 2023.

[25] A review court order was granted in that application on 12 June 2023. In terms of that order, the Minister's decision of 31 March 2022 to revoke the thirteenth respondent's 15-yearlong fishing right was reviewed and set aside. The Minister was

directed to uphold the thirteenth respondent's appeal against the DDG and to issue a permit to the thirteenth respondent in terms of section 13 of the MLRA to allow the thirteenth respondent to exercise the right in the 2023 fishing season. The Minister avers that on 23 June 2023, her attorney of record requested reasons of judgment for this order, and as of 29 November 2023, reasons for the order have not yet been furnished.

[26] The fourteenth respondent also instituted review proceedings under case number 14208/2022 against the Minister's decision to refuse it a fishing right. The fourteenth respondent challenged the scoring of its application for a long-term commercial horse mackerel fishing right submitted in Category B of the horse mackerel fishery for the FRAP 2015/2016. The review application of the fourteenth respondent was granted by agreement on 30 May 2023. The decision of the Minister refusing the fourteenth respondent a long-term fishing right was remitted to the Minister for reconsideration, and the Minister was ordered to communicate her reconsidered decision in writing to the fourteenth respondent within 90 days from the date of order. The Minister indicates she has reconsidered the fourteenth respondent's appeal and will communicate her reconsidered decision to the fourteenth respondent in due course.

[27] The fifteenth respondent also instituted a review application against the decision of the Minister under case number 17233/2020, contending that it was scored incorrectly on appeal regarding its application for a commercial horse mackerel fishing right. The Minister and the DDG opposed the application. The application was heard on 11 and 12 October 2023. As of 29 November 2023, when

the Minister's affidavit was deposed, judgment had yet to be handed down with respect to the fifteenth respondent's application. The sixteenth respondent also launched a review application under case number 17234/2022 against the Minister's decision, contending that it was incorrectly scored and was entitled to a commercial horse mackerel fishing right. The application was also heard on 11 and 12 October 2023. As of 29 November 2023, when the affidavit was deposed, judgment had not yet been handed down with respect to the sixteenth respondent's application.

[28] The seventeenth respondent also instituted a review application against the decision of the Minister under case number 6084/2023, seeking an order to review and set aside the decision of the Minister of 31 March 2022 to terminate or otherwise revoke the seventeenth respondent's commercial horse mackerel fishing right granted on 20 December 2016 by the DDG. The seventeenth respondent contended that it was incorrectly scored and that if it was correctly scored, it ought to be the 8th highest scoring Category B appellant and would have been eligible to continue holding a commercial horse mackerel fishing right. The Minister and the DDG have opposed the seventeenth respondent's review application. The Minister averred that the seventeenth respondent's application had not yet been heard since it was not yet ripe for hearing.

[29] The Minister contends that her decision to allow 12 top-scoring Category B entities into the horse mackerel fishery has not been challenged or impugned by the respondents. Thus, the impact of the litigation, if successful, is that, in reconsidering her appeal decision and awarding category B entities a commercial horse mackerel right pursuant to an order of this court, the Minister must determine a new list of the

12 top-scoring category B applicants. In providing a practical explanation of the impact of the ongoing litigation, the Minister stated that if, on reconsideration of the thirteenth respondent's appeal, she determines that, indeed, the thirteenth respondent is entitled to a commercial horse mackerel fishing right, one of the category B right holders will need to be excluded. This is because the Minister has determined a cut-off of the 12 top-scoring category B entities who would be awarded a commercial horse mackerel fishing right.

[30] In the same way, regarding the fourteenth respondent, if on reconsideration of the review order granted in favour of the fourteenth respondent under case 14208/2022, she determines that the fourteenth respondent is entitled to a total score of 79,11 per cent as alleged in its review application, the fourteenth respondent would fall into the twelve top scoring Category B appellants and will rank in seventh place. This would mean that one of the top-scoring would no longer qualify for a commercial horse mackerel fishing right and would be excluded. The Minister further averred that current Category B right holders will be impacted by this court's orders regarding the above-mentioned ongoing litigation. According to the Minister, the ongoing litigation is interlinked and impacts on each other. For this reason, she did not publish a revised decision regarding the fourteenth respondent's appeal.

[31] During February 2023, the Minister convened a meeting with the Department's officials and tasked them to find a holistic solution to the constant upheaval in the sector. The Minister indicated that she wanted the piecemeal litigation and decision-making to end and needed the Department and the industry

entities to find a way to end the litigation. The Minister asserted that she hoped a solution could be found to obviate the need for such litigation. In the eighth months since February 2023, it became apparent that this would not be possible, and it was for that reason that he gave instructions to her legal representatives to institute legal proceedings in respect of the Category B sector. To this end, the Minister seeks to ensure that until certainty has been achieved, no category B right holder will be permitted to fish.

[32] The Minister averred that this application was brought urgently because right holders commence with permit applications between October and November of the preceding year, and the Department is in the process of issuing these permits as they are required in law to do. The Minister further asseverated that as a result, she is left with no choice but to seek urgent interim relief directing that no permits be issued to category B right holders pending the finalisation of the litigation instituted in respect of Category B of the horse mackerel fishery. To the extent that permits have already been issued, the holders of those permits be interdicted from utilising them. If the relief is not granted, the Minister contended that the very purpose of the relief sought would be defeated in that successful appellants being introduced into the industry will have to wait until 2025 to start fishing while those who ought not to be fishing will be permitted to fish for another season.

The second respondent's opposition to the applicant's application

[33] The second respondent is a Category B right holder in the Horse Mackerel fishery. The second respondent contended that on 31 March 2022, after several

appeals, the Minister published her Final General Published Reasons for the Decisions on Appeal in the horse mackerel fishery. In terms thereof, the second respondent was allocated 7.78 per cent of the total allowable catch. Pursuant thereto, the second respondent has exercised its Category B right to fish horse mackerel since receipt of the right following the FRAP:2015/2016 process in November 2016.

[34] The second respondent asserted that it planned to exercise its Category B right to fish horse mackerel in the 2024 season and avers it cannot afford not to do so. The second respondent further asserted that the Minister's application is entirely misconceived and not necessary or appropriate. First, the second respondent contends that the matter is not urgent. The Minister has known about the pending litigation for months. According to the second respondent, the review applications instituted by the fourteenth to the seventeenth respondents were launched almost 14 months ago.

[35] The second respondent reckons that the founding affidavit of the Minister is silent as to why the Minister sees it fit to launch this application on the eve of the 2024 fishing season, notwithstanding the fact that the 2022 and 2023 fishing seasons operated under the current situation. Since 2020, there have been several review applications in this sector, and despite the same, the fishing seasons operated based on the decisions that applied at that time. Before this, the Minister had not sought interdictory relief against the industry pursuant to all the review applications launched since at least 2020, and the industry continued operating without the relief currently being sought on an urgent basis.

[36] Secondly, the second respondent explained that the relief sought by the Minister is both impractical and undesirable in that the likelihood that the pending review applications, subsequent appeals, and consequent public participation process will be determined during 2024 is unlikely. For instance, the review application of the seventeenth respondent is far from being finalised. The applicant, in that matter, has yet to file its supplementary founding affidavit.

[37] Thirdly, the second respondent also relies firmly on the established principle in our law that an exercise of public power cannot be ignored as a nullity based on the supposition that it might have been invalidly made. Rather, an impugned act, such as the allocation of Category B fishing rights in March 2022, remains valid until set aside by a court. Fourthly, the second respondent contended that the Minister does not assert any right that is threatened by an impending imminent or irreparable harm which requires protection by way of an interdict.

[38] According to the second respondent, the Minister's desire for stability and consistency is not a recognised legal basis for interfering with the second respondent's Category B fishing right, which it currently enjoys lawfully, and which right is not disputed. The second respondent also believes that the Minister has not established all the requirements for the grant of an interim interdict. There is no credible evidence before this court that the Minister or the applicants in the pending review applications will suffer irreparable harm if the interdictory relief is not granted. To the contrary, the second respondent could suffer certain financial losses in the

millions, and the broader horse mackerel fishery will be disrupted. The second respondent implored this court to dismiss the Minister's application with costs.

The principal submission by the parties

[39] Mr Jacobs SC, the Minister's legal Counsel, submitted that this urgent application for interdictory relief is aimed at establishing the horse mackerel fishing industry. Counsel submitted that the decision of the Minister to determine a cut-off to the effect that in respect of Category B applicants, only the 12 top-scoring applicants would be allowed into the sector and allocated a commercial horse mackerel fishing right remains extant. Pursuant to the publication of the Minister's final decision of appeals, the fourteenth to the seventeenth respondents instituted review applications in respect of the Minister decision not to award them a long-term commercial horse mackerel. These review applications have not been finalised and are at various stages of completion.

[40] Mr Jacobs submitted that the effect of the litigation, if successful, is that in reconsidering her decision on appeal and awarding Category B entities a commercial horse mackerel right pursuant to an order of this court, the Minister must determine a new list of the top scoring Category B applicants. As matter stands, the contention proceeded, entities who ought not to be fishing may be fishing, while entities who ought to be entitled to fish do not hold the right yet. This is because of the pending litigation proceedings referred to above. Mr Jacobs further submitted that the interdictory relief seeks to ensure that all affected category B fishing entities are treated the same way and that no one will be permitted to fish horse mackerel

pending the determination and finalisation of the litigation instituted in respect of category B the horse mackerel fishery. Counsel implored the court to grant the relief sought in the notice of motion.

[41] Mr Rosenberg SC, the second respondent's Counsel, submitted that the second respondent is a Category B right holder in the horse mackerel fishery. The allocation of its fishing rights occurred under the 2015/2016. The second respondent has exercised its Category B right to fish horse mackerel since receipt of the right following the FRAP 2015/2016. Mr Rosenberg submitted that as it has done in previous years, the second respondent plans to exercise its category B right to fish horse mackerel in the 2024 season. Counsel submitted further that the applicant's application is entirely misconceived and not necessary or appropriate.

[42] Mr Rosenberg argued that the matter is not urgent as the Minister has known about the pending review applications, which sought to impugn her decision for months. In tandem with the second respondent's answering affidavit, Mr Rosenberg argued that the Minister does not assert any right which requires protection by way of an interdict. According to Mr Rosenberg, the Minister's desire for stability and consistency is not a recognised legal basis for the interference with the second respondent's Category B fishing right, which it currently enjoys lawfully, which right is not in dispute. To disrupt vested rights in respect of the 2024 horse mackerel fishing season on the vague and uncertain basis put forward by the Minister, the argument proceeded, cannot be supported. It was Counsel's submission that the interdict would potentially have a significant negative impact on the industry and would

prevent vessels from operating for at least three months, in addition to the ancillary effects on service providers dependent on those vessels operating.

[43] Counsel further submitted that the pending review applications are not before this court, and the minister himself has refrained from engaging on the prospect of success of each undetermined review application. In these circumstances, the argument went, it is inconceivable that this court should be asked to effectively prejudge some of those matters by interdicting the category B fishing rights pending a determination thereof. It was also submitted on behalf of the second respondent that the Minister has not satisfied all the requirements for interim relief. To that end, Mr Rosenberg implored the court to dismiss the Minister's application with costs, alternatively, to strike it from the roll together with a punitive costs order that includes the costs of two Counsels.

Issues to be decided

[44] The critical question to be decided in this matter is whether the Minister and the DDG have made out a case for an interim interdict restraining the Category B right holders who have already been issued with a fishing permit (including the second respondent) for the horse mackerel 2024 from fishing in terms of such permit pending the finalisation of the review applications of the thirteenth to the seventeenth respondents. Ancillary to this question, this court is enjoined to consider whether the Minister has made out a case for an order authorising the DDG and officials of the Department to refuse to issue fishing permits to current Category B right holders in

the horse mackerel fishing sector for the 2024 fishing season pending the outcome of the review applications instituted by the thirteenth to the seventeenth respondents.

Relevant legal principles and discussion

Urgency

[45] The second respondent has challenged the Minister's application on the basis that it is not urgent. It is trite that the general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of Court. The court will first consider whether an applicant has averred facts which, objectively speaking, demonstrate urgency. In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is, in law, required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course.

[46] Simply put, Rule 6(12)(b) requires two things of an applicant in an urgent application. First, the applicant must explicitly state the circumstances that he avers render the matter urgent and, secondly, why he claims that he would not be afforded substantial redress at a hearing in due course. Where the application lacks the requisite element or degree of urgency, the court can, for that reason, decline to exercise its powers under Rule 6(12)(a). (See *Commissioner, South African Revenue Services v Hawker Air Services (Pty) LTD* 2006 (4) SA 292 (SCA) para 9).

[47] In the instant matter, the basis of the second respondent's challenge to the issue of urgency is that the applications of the thirteenth to the seventeenth

respondents were issued some time ago, and the Minister was aware of these applications. Furthermore, the second respondent asserted that the Minister's founding affidavit made no effort to satisfy these requirements. I do not agree with this proposition. The Minister has stated that the urgency of this application lies in the imminent commencement of the 2024 fishing season and that without the interdictory relief, the Category B right holders will be entitled to fish from 1 January 2024, pending the outcome of the review application. Importantly, the Minister has made it plain that the present application is brought based on the impact of a piecemeal approach to considering the review applications as and when they are finalised.

[48] Mr Jacobs contended that the issues arising in this matter, which bring about instability in the horse mackerel fishery, are continuous and ongoing. This situation, argued Counsel, affects the Minister's ability to implement her statutory obligations. Importantly, the Minister explained that she first made concerted efforts to resolve the issues without resorting to litigation. She tasked the Department's officials to find a holistic solution to the constant upheaval in the sector. Notwithstanding these efforts, the Minister has been left with no alternative but to approach this court for the relief sought in the notice of motion. From the totality of the evidence placed before this court, I am of the view that the Minister has clearly set out urgency as envisaged in Rule 6(12) of the Uniform Rules. I turn to consider the Minister's application on the merits.

The Minister's application on the merits

[49] As discussed above, pending the finalisation of the review applications of the thirteenth to the seventeenth respondents, the applicant seeks an order authorising the DDG to refuse to issue fishing permits to the current Category B right holders in the horse mackerel fishing sector for the 2024 fishing seasons. The Minister also seeks an interdictory order restraining any Category B right holder issued with a fishing permit from fishing in terms of that permit. In addition, the Minister seeks a procedural order directing the pending review applications to be subjected to a case management process by the Acting Judge President to ensure they are finalised by 29 February 2024.

[50] It is common cause that the pending review applications discussed above are at different stages. In two applications (Bayana Bayana – Case No. 17233/2020) and (Ukloba – Case No. 17234/2022) judgment is pending. At the same time, reasons of judgment are still pending in Timowise – Case No. 8760/2022. It is also common cause that the seventeenth respondent's application is far from being finalised. At the hearing of this matter, the court was informed that the applicant in that matter has not yet filed its supplementary founding affidavit.

[51] In my view, the relief sought by the Minister is very broad and may cause strife to the second respondent. It must be stressed that the finalisation of the pending review applications may not be the end of the matter. There may still be appeals to those judgments in respect of those applications. Thus, there is no likelihood that the pending review applications and subsequent appeals will all be finally determined during 2024.

[52] Furthermore, I am of the view that the relief that the applicant seeks directing that the acting judge president to case-manage all the review applications mentioned above is unsustainable, particularly in the applications where judgment is pending. It must be stressed that from the five cases, three have been allocated to judges, and two of them have recently been heard, and it is expected that judgment will be delivered in due course. It is inconceivable how those matters where judgment is being considered and is imminent would be case managed by the Acting Judge President. To this end, I agree with Mr Rosenberg that the relief the Minister seeks is both impractical and unsustainable.

[53] What compounds the difficulty in the Minister's application is that the pending review applications are not before this court, and the Minister has refrained from engaging on the prospects or probability of success with respect to each of the undetermined applications. This court cannot be expected to grant an interdict that would have serious consequences to the second respondent when the merits of the review applications that the Minister relies on to ground her application are not raised in this court. In other words, it is unclear whether there are merits in those review applications to warrant an interdict in this case pending an outcome of those applications. As astutely pointed out by Mr Rosenberg, it is inconceivable that in these circumstances, this court should be asked to effectively prejudge some of those matters by interdicting the Category B fishing rights holders pending a determination of those review applications whose merits in this application were not canvassed or at least highlighted.

[54] Significantly, the Minister has acknowledged that the interdictory relief she seeks will negatively impact the category B horse mackerel industry. The Minister has also affirmed that disallowing the respondents the right to fish even for a few months will cause hardship. The second respondent has explained that the interdict that the Minister seeks will potentially have a significant negative impact on the industry and will prevent vessels from operating for at least three months, in addition to ancillary impacts on service providers dependent on those vessels operating.

[55] What militates against the Minister's application is the score allocated to the second respondent after the Minister's final decision of 31 March 2022. In terms of that decision, the Minister asserted that after receiving and considering comments and representations from the horse mackerel fishery, she published her final reasons for her decision. In terms of her decision, 12 Category B applicants were considered successful. The second respondent was the second highest entity on the Minister's scorecard and received a weighted score of 85,38 and an allocation of 7,87 of the total allowable catch in category B of the horse mackerel fishery.

[56] From the Minister's appeal decision, it is abundantly clear that even after the finalisation of the review applications, the second respondent will still score high and will still fall within the 12 top scoring entities determined by the Minister. It cannot be suggested whatsoever that the second respondent would fail to meet the requirements of the Minister when the rescoring is reevaluated. In my opinion, the proposed relief will unfairly harm the second respondent, who has been correctly scored and meets the Minister's requirements satisfactorily.

[57] I appreciate that the Minister seeks to restore stability in the sector and ensure that all affected Category B fishing entities are treated the same. However, I am of the view that the relief is broad and untenable. It is irrefutable that the second respondent relied on the fact that it is the owner of the fishing right allocated to it in terms of the FRAP 205/2015.

Did the Minister Satisfy the requirements of an interim interdict?

[58] The requirements for an interim interdict are well established in our law. The applicants must show *prima facie* right, a well-grounded apprehension of irreparable harm if the relief is not granted, a favourable balance of convenience, and the absence of any other satisfactory remedy. These requisites for an interdict should not be considered separately or in isolation, but in conjunction with one another, to determine whether the court should exercise its discretion in favour of the grant of the interim relief. (See *Olympic Passenger Service (Pty) Ltd Ramlagan* 1957 (2) SA 382 (D) at 383E-F).

[59] Pursuant to the view I take, I deem it unnecessary to deal with these requirements *ad seriatim* in detail. However, I must stress that the second respondent will suffer irreparable harm as opposed to the Minister if the interim interdict is granted. The impact on the second respondent will be immediate in that the second respondent will immediately halt operations. Perhaps it is apposite to remind ourselves that once a right is granted, the relevant right holder structures its business, and employees structure their lives around having access to the work that comes along with holding such a right. It cannot be disputed that the second

respondent has arranged its affairs according to the rights allocated to it, and it has consequently employed staff to administer the fishing company.

[60] A blanket moratorium on the fishing of horse mackerel will affect not only the second respondent but also its employees, its contracting parties, and its customers in the various parts of the African continent. The second respondent stated that the horse mackerel caught in terms of its total allowable catch allocation is exported to countries in Africa where customer relationships have been built over many years. Should the interdict be granted, there will be an interruption of the supply of horse mackerel to these markets, and customers in these countries may look for alternative suppliers of horse mackerel. In the circumstances, a court-sanctioned moratorium on fishing in the sector is not in the interest of justice.

[61] In addition, as the second respondent submitted, if the interim relief is granted, the vessel operators/owners will also suffer prejudice in that their vessels will be laid up, and they will have to incur significant costs to keep the vessels along the quayside without earning any income. Concerning the alternative remedy, I agree with the second respondent's Counsel that the Minister had other alternative remedies available to her. For instance, the Minister could have applied to set aside the fishing rights allocated to the second respondent or to the holders of rights in Category B of the horse mackerel fishing sector. In my view, the Minister has not satisfied all the requirements for the grant of an interim interdict.

[62] I am further of the view that the balance of convenience favours the second respondent and militates against the grant of the interdictory relief. If the interim

interdict is granted the second respondent will have suffered a complete loss of revenue for the period in which the order is in place. As explained earlier, this will affect its business, employees, and trade customers. This hiatus is likely to endure for a substantial period as the court process with respect to the review applications drags out. In my opinion, the grant of the interdictory relief in these circumstances, will cause untold hardship to the second respondent.

[63] In view of all these considerations, I am of the opinion that the Minister's application for an interdict must fail. Furthermore, nothing was presented to warrant a departure from the norm that costs follow the event.

Order

[64] In the result, the following order is granted:

64.1 The applicants' application is hereby dismissed. The applicants are ordered to pay the costs hereof, including the costs of two Counsels where so employed.

LEKHULENI JD

JUDGE OF THE HIGH COURT

Appearances

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